ARKANSAS SUPREME COURT

No. CR 06-584

	Opinion Delivered **April 5, 2007**
MICHAEL L. VENN Appellant v. STATE OF ARKANSAS Appellee	PRO SE APPEAL FROM THE CIRCUIT COURT OF BENTON COUNTY, CR 2002-1141, HON. TOMMY J. KEITH, JUDGE AFFIRMED.

PER CURIAM

In 2004, Michael L. Venn, appellant herein, was convicted by a jury of rape, and sentenced to twenty years' imprisonment. The Arkansas Court of Appeals affirmed. *Venn v. State*, CACR 04-1315 (Ark. App. Nov. 2, 2005). Subsequently, appellant filed in the trial court a pro se petition for postconviction relief pursuant to Ark. R. Crim. P. 37.1. The trial court denied the petition without a hearing. Appellant, now represented by counsel, has lodged this appeal of the order denying the petition.

We do not reverse a denial of postconviction relief unless the trial court's findings are clearly erroneous. *Greene v. State*, 356 Ark. 59, 146 S.W.3d 871 (2004). A finding is clearly erroneous when, although there was evidence to support it, the appellate court after reviewing the entire evidence is left with the definite and firm conviction that a mistake has been committed. *Flores v. State*, 350 Ark. 198, 85 S.W.3d 896 (2002).

On appeal, appellant maintains that he was entitled to postconviction relief based upon his temporary absence from jury selection. The record from the jury trial reflects that during voir dire,

the jury panel was questioned generally about sexual offenses, including experiences related to themselves, family members and friends. Later, those jurors who responded in the affirmative were questioned individually in the jury room about their specific experiences and frame of mind. After the questioning of Mr. Koch, a venireman, the transcript noted that appellant left the jury room. The record did not indicate that appellant returned to the jury room during the remainder of the sequestered questioning, and he was later seated in the courtroom when he was identified by the victim. After appellant's departure from the jury room, neither trial counsel, the trial court nor the state objected.[1] In his single point on appeal, appellant complains that the trial court erred when it denied his Rule 37.1 petition without a hearing.[2]

With regard to the hearing, this court has recognized that a trial court is not required to hold an evidentiary hearing on a Rule 37.1 petition, even in death penalty cases. *Sanders v. State,* 352 Ark. 16, 98 S.W.3d 35 (2003); *Nance v. State*, 339 Ark. 192, 4 S.W.3d 501 (1999). The trial court has discretion pursuant to Rule 37.3(a) to decide whether the files or records are sufficient to sustain the court's findings without a hearing. *Sanders*, *supra*. In accordance with this rule, a trial court need not hold an evidentiary hearing where it can be conclusively shown on the record, or on the face of the petition itself, that the allegations have no merit. *Id.*

In the order denying the petition, the trial court held that the files and record showed conclusively that appellant was not entitled to relief. The trial court relied upon the trial transcript

[1]During the questioning of the next panel member after appellant's exit, the trial court and trial counsel both mentioned that appellant was no longer in the jury room. However, no other reference to his absence was contained in the record below.

[2]According to appellate counsel, appellant raised thirteen claims in his original petition filed in the trial court. Of those claims, counsel notes that all but one issue should have been raised on direct appeal, were raised on direct appeal, or were conclusory in nature. Claims argued to the trial court but not argued on appeal are abandoned. *See Jordan v. State*, 356 Ark. 248, 147 S.W.3d 691 (2004). These issues have been abandoned by appellant.

that indicated that appellant was present for the sequestered questioning of seven prospective jurors. After the seventh juror was questioned, the trial court noted that appellant then left the jury room "apparently of his own accord and without the Court's permission[.]" Ten more jurors were questioned, but the trial court found that appellant suffered no prejudice.

It has long been held that a criminal defendant clearly has the right to be present and consulted at any stage of a criminal proceeding that is critical to the outcome, if his presence would contribute to the fairness of the procedure. *Kentucky v. Stincer*, 482 U.S. 730 (1987); *Lewis v. United States*, 146 U.S. 370 (1892). Arkansas courts have long embraced this fundamental right. *Lowery v. State*, 297 Ark. 47, 759 S.W.2d 545 (1987) (citing *Cole v. State*, 10 Ark. 318 (1849); *Sneed v. State*, 5 Ark. 431 (1843)); *Bell v. State*, 296 Ark. 458, 757 S.W.2d 937 (1988) (citing *Whittaker v. State*, 173 Ark. 1172, 294 S.W. 397 (1927); *Brown v. State*, 24 Ark. 620 (1867)). This right is premised upon constitutional principles found in the Confrontation Clause of the Sixth Amendment of the United States Constitution, and Article 2, § 10, of the Arkansas Constitution – the right of the accused to be heard, and the right of the accused to confront his accusers. *Faretta v. California*, 422 U.S. 806 (1975); *Illinois v. Allen*, 397 U.S. 337, *reh'g denied*, 398 U.S. 915 (1970); *Bell*, *supra*.

The right of a defendant to be present and consulted during a substantial step in the proceedings has been held to include the selection of jurors during voir dire, as well as other matters concerning jurors. *Gomez v. United States*, 490 U.S. 858 (1989); *Shaw v. United States*, 403 F.2d 528 (8th Cir. 1968) (citing *Lewis*, *supra*); *City of Mandan v. Baer*, 578 N.W.2d 559 (N.D. 1998). *See also Goff v. State*, 329 Ark. 513, 953 S.W.2d 38 (1997). However, this right is not absolute. *Allen*, *supra* (citing *Diaz v. United States*, 223 U.S. 442 (1912)). A criminal defendant may waive

this right by words or actions in certain instances. *Allen*, *supra*; *Snyder v. Massachusetts*, 291 U.S. 97 (1934); *Ridling v. State*, 348 Ark. 213, 72 S.W.3d 466 (2002). A distinction is sometimes made between capital and noncapital cases when applying this rule, as well as the nature of the substantial step at issue. In weighing a criminal defendant's rights against his words or actions, the courts look to the resulting prejudice. *Ridling*, *supra*; *Bell*, *supra*.

Here, appellant's own actions resulted in a waiver of his right to be present and consulted during the time he removed himself from sequestered voir dire. The present matter involved a noncapital offense, and the substantial step at issue concerned only a portion of voir dire, rather than the whole voir dire process. Appellant's counsel did not object to appellant's absence, and counsel remained in the jury room during the entirety of the sequestered voir dire. The record does not reveal that appellant was absent from the remainder of voir dire, or from any critical stage of the trial. Morever, appellant failed to show how he was prejudiced by his minimal absence in this matter. Appellant made no showing that he was entitled to a hearing on his petition.

We find no error and affirm the ruling of the trial court.

Affirmed.